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No. 93-593

In The

Supreme Court of the United States

October Term, 1993

ROBERT DAVIS, et al.,

Petitioners,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Ninth Circuit correctly determined that petitioners failed to sustain their burden, in opposition to a motion for summary judgment, of identifying specific facts to establish their standing to challenge remedial provisions of a desegregation consent decree affecting some but not all hiring and promotion decisions.

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BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari filed by petitioners Robert Davis, Jane Kennedy, Angela Wingate, Anna Marie Karsant, Jan Sutter and Susan Tibbons.

STATEMENT OF THE CASE

In this action, the six petitioners sought to challenge a fifteen-year-old consent decree and a related affirmative action plan. Petitioners argued that the Decree and plan

unfairly burdened their rights as non-minority teachers.[1] Throughout the litigation, however, petitioners were remarkably disinterested in producing the facts necessary to establish their case. They conducted virtually no discovery. Petitioners failed to identify any facts connecting the Consent Decree or plan to any employment injury they identified.

Based on this failure of proof, in June 1991, respondents moved for summary judgment on the ground, among others, that petitioners lacked standing. Not one of the petitioners submitted a declaration in opposition to respondents' motion for summary judgment.

Both the trial court and Ninth Circuit ruled that petitioners lacked standing. In reality, however, the failure of evidence was more fundamental: There was no evidence that the circumstances of the petitioners and their alleged injuries had any relationship at all with the Consent Decree.

The background of this action begins in June 1978. At that time, the San Francisco branch of the National Association for the Advancement of Colored People brought an action alleging that the San Francisco Unified School District ("SFUSD") maintained a segregated school system. The complaint sought the desegregation of San Francisco public schools.

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[1] Initially, there were nine plaintiffs. Two of the plaintiffs were dismissed pursuant to stipulation. Plaintiff Mary Ann Wold did not join the petition for certiorari. Additionally, the City and County of San Francisco was dismissed as a defendant by stipulation.

After extensive litigation, by order dated May 1983, the district court approved a Consent Decree executed by the parties. The primary goal of the Consent Decree was to benefit the children of San Francisco. Paragraphs 34 and 35 of the decree concerned desegregation of faculty, administration and other SFUSD staff. Paragraph 34 required SFUSD to:

> continue to implement a staffing policy such as that contained in Policy No. 4111.1, the *goal* of which is "to achieve a staff at each school site and District location that will reflect the student population of the District." (Emphasis added.)

Paragraph 35 of the decree provides:

> The S.F.U.S.D. shall assure that faculty and other staff will be equitably assigned throughout the District, within the meaning of applicable legal standards.

The decree was not appealed.

Petitioners – all current or former teachers in SFUSD – alleged discrimination in hiring and promotions arising out of SFUSD's affirmative action plan ("the Plan"). Petitioners conceded that the Plan was required by the Consent Decree; in other words, petitioners' challenge to the Affirmative Action Plan is necessarily a challenge to the Consent Decree that required the Plan. Petitioners never asserted they suffered any discrimination independent of the Plan.

Petitioners filed their original complaint in California Superior Court on January 29, 1990. The action was removed to federal district court. Petitioners filed a first amended complaint on February 1, 1990 and a second

amended complaint on October 3, 1990. The second amended complaint alleged six claims for relief: (1) violation of article I, section 8 of the California Constitution; (2) violation of 42 U.S.C. section 1981; (3) violation of 42 U.S.C. section 1983; (4) violation of Title VII of the Civil Rights Act of 1964; (5) violation of California Government Code section 11135; and (6) a request for declaratory relief invalidating SFUSD's Affirmative Action Plan.

Petitioners moved for class certification on July 27, 1990. The District Court denied the class certification motion.

Through discovery, respondents sought to uncover how the individual petitioners believed they were injured by the Consent Decree and Affirmative Action Plan. This discovery revealed that not a single petitioner could identify any specific facts linking the Decree or Plan to any cognizable employment injury.

None of the petitioners introduced probative evidence that SFUSD's alleged failure to hire or promote them was influenced in any way by the Consent Decree or Affirmative Action Plan. Nor, in most cases, were plaintiffs even able to point to positions for which they were qualified but not hired. Their individual claims involved various unconnected complaints regarding seniority issues or SFUSD's "English as a second language" program.

Petitioners took virtually no discovery in this case. Not one set of interrogatories was propounded by any petitioner. Not one deposition was taken of any school principal making hiring decisions. No request was made for any data regarding applicant flow or hiring, or any

other statistics. The only discovery taken by petitioners consisted of one brief deposition (which consisted mainly of authenticating SFUSD's Affirmative Action Plan), one brief request for production of documents (which simply sought the Affirmative Action Plan and a few related policies), and one request for admissions (seeking acknowledgment that the Superintendent of Schools had written an article in a local newspaper).

After the close of discovery, both sides moved for summary judgment. Petitioners sought summary judgment on their declaratory relief claim that the Plan was unlawful. None of the petitioners filed a declaration in support of the motion. Rather, petitioners relied on their answers to SFUSD's interrogatories, a single page from the transcript of the only deposition taken by petitioners in this action, as well as a smattering of unauthenticated statistics, most of which were based on the 1980 census.

SFUSD moved for summary judgment or partial summary judgment on a number of independent grounds: (1) petitioners' lack of standing to challenge the Plan and the Consent Decree Judgment; (2) the bar of the applicable statutes of limitations; (3) the lack of merit of petitioners' state claims; (4) the lack of merit of petitioners' section 1981 claims, given that public employment in California is based on statute, not contract; and (5) the failure of petitioners to demonstrate any discrimination or causal link between the Consent Decree and petitioners' alleged injury.

In opposing SFUSD's summary judgment motion, petitioners advanced what they characterized as factual statements about the individual petitioners. The evidence

upon which petitioners relied, however, consisted almost exclusively of conclusory statements without supporting evidence. The sole source of these statements was petitioners' responses to the interrogatories propounded by SFUSD.

In support of their summary judgment motion, and in opposition to petitioners' motion, respondents filed, in addition to other evidence, two declarations by Roderick Hong, SFUSD's personnel officer. Mr. Hong explained that the Plan sets forth goals for SFUSD and not quotas that must be met. Specifically, Mr. Hong testified about the application of the plan:

> When there are two otherwise equally qualified applicants for a particular [long-term substitute teacher position], the Plan allows the principal to consider the District's affirmative action plan as one of the factors in his or her decision. A principal is never required to choose one candidate over another based solely on the applicant's race. This is also true with respect to the hiring of permanent teachers. The affirmative action plan is simply one factor that the District may consider when it appoints otherwise equally qualified teachers to permanent positions.

Petitioners submitted no evidence to dispute Mr. Hong's testimony regarding application of the Plan.

The district court granted SFUSD's summary judgment motion on the ground that petitioners had failed to meet their burden of identifying specific facts demonstrating they have standing to challenge the Consent

Decree or Plan. After noting the lack of discovery conducted by petitioners and the conclusory nature of their allegations, the district court observed:

> Plaintiffs bear the burden of proof on standing. *Whitmore v. Arkansas*, 110 S.Ct. 1717, 1723 (1990). Therefore, on summary judgment the defendant-moving party satisfies its burden by "pointing out to the district court [] that there is an absence of evidence to support the non-moving party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). The District has met this burden. ¶ *Plaintiffs fail to produce any evidence showing that the Plan has caused them to suffer any legally cognizable injury. Plaintiffs' failure to conduct any meaningful discovery has been their undoing.* Their action cannot survive a motion for summary judgment on the ground they lack standing. (Emphasis added.)

On September 12, 1991 the district court entered judgment in favor of respondents. Petitioners appealed.

The Ninth Circuit affirmed in an unpublished opinion, observing that this Court has "emphasized the importance of a litigant's coming forth with specific facts in support of its right to sue when faced with a summary judgment motion." *Citing Lujan v. National Wildlife Fed'n*, 497 U.S. 871, 884 (1990). While petitioners bear the burden of establishing their standing, the Court of Appeals noted that petitioners' evidence consisted primarily of conclusory statements and that none of the petitioners had pointed to any facts establishing that the challenged Consent Decree or the Plan had any connection with the employment problems petitioners cited. Like the district court, the Court of Appeals concluded that petitioners

had failed to produce facts establishing their standing to challenge the Consent Decree and Plan.

The Ninth Circuit distinguished this case from *Northeastern Fla. Chapter of the Associated General Contractors v. Jacksonville*, 113 S.Ct. 2297 (1993), upon which petitioners rely almost exclusively in their petition:

> We further note that the Supreme Court's recent opinion in *Northeastern Fla. Chapter of the Associated General Contractors v. City of Jacksonville*, [113 S.Ct. 2297 (1993)], which came down after this case was argued and submitted, does not alter our standing analysis. In *General Contractors*, non-minority contractors alleged that they were unable to bid on contracts because of Jacksonville's minority set-aside program. *Id.* at *6, *23 (plaintiffs would have bid on the contracts "but for" the set-aside ordinance). The Court held that the contractors had standing to challenge the ordinance: "To establish standing . . . a party challenging a set-aside program like Jacksonville's need only demonstrate that it is able and ready to bid on contracts and that a discriminatory policy *prevents* it from doing so on an equal basis." *Id.* at *19 (emphasis added).
>
> By contrast, in the case before us, plaintiffs were not barred from applying for the jobs they allegedly sought. They were not "excluded from consideration" as a result of a facially "discriminatory" classification. Moreover, unlike in *General Contractors*, as is discussed below, none of the plaintiffs here has succeeded in establishing a connection between his or her failure to obtain a job and the District's affirmative action program. Instead, plaintiffs assert generalized difficulties in obtaining employment that cannot be

traced to the affirmative action plan. *Cf. id.* at 422 U.S. 490 (1975) (holding no standing where plaintiffs failed to demonstrate that their inability to locate housing resulted from challenged zoning ordinance).

In relying on *Northeastern Florida Chapter of the Associated General Contractors of America v. City of Jacksonville*, 113 S.Ct. 2297 (1993), petitioners fail to confront the Ninth Circuit's persuasive distinction of that case.

REASONS FOR DENYING THE WRIT

I.

APPLYING SETTLED PRINCIPLES OF STANDING, THE NINTH CIRCUIT CORRECTLY HELD THAT PLAINTIFFS LACKED STANDING TO CHALLENGE THE CONSENT DECREE AND AFFIRMATIVE ACTION PLAN

The Court of Appeals held that petitioners lack standing to challenge the Consent Decree and the Plan. In doing so, the Court of Appeals correctly applied well-settled jurisdictional principles.

This Court has consistently emphasized that standing is a fundamental component of Article III, which limits the judicial power of federal courts to resolving "cases and controversies." The Article III standing requirement must be met even where a statute entitles plaintiffs to bring a private cause of action. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Moreover, the "threshold inquiry into standing in no way depends on the

merits of the [petitioner's] contention that particular conduct is illegal. *Whitmore v. Arkansas*, 110 S.Ct. 1777, 1723 (1990) (internal quotation marks omitted).

This Court has explained the fundamental importance of standing to a federal court's jurisdiction:

> The requirement of actual injury redressable by the court serves several of the "implicit policies embodied in Article III." It tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action.
>
> The standing requirement serves other purposes. Because it assures an actual factual setting in which the litigants asserts a claim of injury in fact, a court may decide the case with some confidence that its decision will not pave the way for lawsuits which have some, but not all, of the facts of the case actually decided by the court.

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982) (citations omitted); *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541-42 (1986) (in cases involving constitutional challenges, the Court has "strictly adhered to the standing requirements to ensure that our deliberations will have the benefit of adversarial presentation and a full development of the relevant facts.")

The Ninth Circuit correctly observed that petitioners bear the burden of demonstrating they have standing to challenge the Consent Decree and the Plan. *Warth v.*

Seldin, 422 U.S. 490, 517-18 (1975). As the Ninth Circuit explained, to establish standing, a plaintiff must satisfy three minimum requirements, and must do more than merely tender general allegations. *See Whitmore v. Arkansas*, 110 S.Ct. at 1723. The Court of Appeals properly determined that petitioners failed to show they could satisfy these requirements.

First, petitioners must establish that they "personally [have] suffered some actual injury or threatened injury as a result of the putatively illegal conduct." *Diamond v. Charles*, 476 U.S. 54, 62 (1986). The injury "must be concrete in both a qualitative and temporal sense." *Whitmore v. Arkansas*, 110 S.Ct. at 1723. In other words, petitioners must allege an injury to themselves that is "distinct and palpable," *Warth*, 422 U.S., at 501, as opposed to merely "[a]bstract." *O'Shea v. Littleton*, 414 U.S. 488, 494 (1974). The purported injury must be real or imminent, not "conjectural" or "hypothetical." *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). Plaintiffs must show personal injury so that the judicial process does not become a "vehicle for the vindication of value interests." *United States v. SCRAP*, 412 U.S. 669, 687 (1973).

Second, petitioners must demonstrate that the injury "fairly can be traced to the challenged action." *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). In other words, there must be a direct causal connection between plaintiff's asserted injury and defendant's challenged action. *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Third, petitioners must demonstrate "a substantial likelihood" that the requested relief will redress the

injury. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 75 (1978); *Simon*, 426 U.S. at 38.

In this case, the district court determined that petitioners lacked standing in connection with a motion for summary judgment. In support of that motion, respondents identified specific parts of the record to show there was no factual support for the claim that any petitioner had been injured by the Consent Decree or Affirmative Action Plan. In doing so, respondents sustained their initial burden of demonstrating the absence of evidence to support petitioners' standing. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

In light of respondents' showing, the burden then shifted to petitioners to "designate 'specific facts showing that there is a genuine issue for trial' " on the issue of standing. *Celotex*, 477 U.S. at 324. Not surprisingly, because petitioners conducted almost no discovery, they failed to satisfy this burden. Their assertions regarding alleged injuries they suffered were conclusory. Nor did petitioners produce specific facts supporting the contention that any of their alleged injuries had any causal connection to the Plan or the Consent Decree. Indeed, not one of the petitioners even bothered to submit a declaration alleging injuries from the Consent Decree or Plan.

In seeking certiorari, petitioners have dropped any pretense that they presented specific facts showing their alleged injuries were caused by the Consent Decree or the Plan; in fact, the petitioners do not even discuss the facts regarding their individual employment situations. Rather, in an attempt to make up for their lack of discovery, petitioners now take the untenable position that there is

an irrebuttable presumption every District teacher has standing to challenge the Consent Decree and the Plan.

Plaintiff's position is directly contrary to the recent teachings of this Court:

> Concerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so. *We presume that federal courts lack jurisdiction unless the contrary appears affirmatively from the record.* It is the responsibility of the complainant to clearly allege facts demonstrating that he is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers. (Emphasis added.)

Renne v. Geary, 111 S.Ct. 2331, 2336 (1991) (citations and internal quotation marks omitted); *FW/PBS, Inc. v. City of Dallas*, 110 S.Ct. 596, 608 (1990) ("It is a long-settled principle that standing cannot be 'inferred argumentatively from averments in the pleadings' but rather 'must affirmatively appear in the record.' ").

Petitioners' startling new view of Article III standing is premised entirely upon a misreading of *Northeastern Florida Chapter of the Associated General Contractors v. City of Jacksonville*, 113 S.Ct. 2297 (1993). *General Contractors* is clearly distinguishable from this case.

In *General Contractors*, an association of individuals and firms in the construction business challenged an ordinance *requiring* that ten percent of the amount spent on city contracts be set aside each fiscal year to minority business enterprises. "Once projects were earmarked for MBE bidding by the city's chief purchasing officer, they were 'deemed reserved for minority business enterprises

only.' " 113 S.Ct. at 2299. Accordingly, it was indisputable that the challenged ordinance precluded plaintiff's members from bidding on or being awarded 10% of the contracts awarded by the City. In its complaint, the association alleged that its members regularly bid on and performed city construction work and that they would have bid on designated set aside contracts if not for the restrictions imposed by the challenged ordinance. 113 S.Ct. at 2304. Given the mandatory nature of the set-aside program and the allegations of the association, this Court concluded it was improper to dismiss the action for lack of standing.

General Contractors is distinguishable from this case. Unlike the mandatory set-asides challenged in *General Contractors*, the Consent Decree and Plan speak of *goals*. The Plan does not establish a certain percentage of teaching positions for which white applicants may not apply. In fact, contrary to petitioners' assertion, nothing in the Plan even requires SFUSD to consider race when making a particular employment decision. Rather, the goals of the Plan are merely one factor that SFUSD *may* consider. Accordingly, the presumption in *General Contractors* that the set-aside program caused a redressable injury simply does not apply here; rather, the issue of whether the Plan was a factor in a particular hiring decision is factual.

That distinction is particularly critical because SFUSD, unlike the defendant in *General Contractors*, challenged petitioners' standing through a summary judgment motion rather than through a motion to dismiss. *General Contractors* makes clear the fundamental nature of this distinction:

> In its complaint petitioner alleged that its members regularly bid on construction contracts in Jacksonville, and that they would have bid on contracts set aside pursuant to the city's ordinance were they so able. Complaint ¶¶ 9, 46. *Because those allegations have not been challenged (by way of a motion for summary judgment, for example), we must assume that they are true.* See *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, ___ n.3 (slip op. at 7, n.3); *Pennell v. San Jose*, 485 U.S. 1, 7 (1988). Given that assumption, and given the legal standard we have reaffirmed today, it was inappropriate for the Court of Appeals to order that petitioner's complaint be dismissed for lack of standing.

113 S.Ct. at 2304-05 (emphasis added).

Thus, *General Contractors* makes a clear distinction between the differing assumptions and burdens that apply at the motion to dismiss and summary judgment stages of an action. Respondents did not challenge the allegations in petitioners' complaint regarding standing through a motion to dismiss. Rather, SFUSD challenged those assertions in a summary judgment motion. In order to survive the motion, petitioners were required to point to facts supporting those generalized allegations. As the Court of Appeals explained, petitioners pointed to no evidence demonstrating that the Plan was considered in connection with any of the employment decisions challenged by petitioners. Nor did petitioners identify any specific facts to show that the Consent Decree or Plan posed a real and immediate threat of harm to them with respect to any future employment decision. *See Whitmore v. Arkansas*, 110 S.Ct. at 1725 ("A threatened injury must be 'certainly impending' to constitute injury in fact").

Accordingly, the Court of Appeals properly concluded that petitioners lacked standing.

This conclusion is supported by *Lujan v. Defenders of Wildlife*, 112 S.Ct. 2130 (1992). In *Lujan*, the Court explained the differing standards a plaintiff must meet to establish standing at the pleading stage and at summary judgment:

> The party invoking federal jurisdiction bears the burden of establishing these [standing] elements. Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation. At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim. *In response to a summary judgment motion, however, the plaintiff can no longer rest on such mere allegations, but must set forth by affidavit or other evidence specific facts . . . which for purpose of the summary judgment will be taken to be true.*

112 S.Ct. at 2136-37 (emphasis added, internal quotation marks and citations omitted).

Here, petitioners utterly failed to sustain their burden of establishing their standing to challenge the Consent Decree or Affirmative Action Plan. Not one of the petitioners submitted an affidavit, or any other evidence, connecting the Consent Decree or Affirmative Action Plan to a challenged employment decision. The petition should be denied.

II.

THE COURT SHOULD NOT GRANT THE PETITION FOR CERTIORARI ON THE MERITS OF PETITIONERS' CHALLENGE TO THE CONSENT DECREE AND THE PLAN

In addition to seeking review of the Court of Appeals' holding that petitioners lack standing, petitioners invite this Court to review the merits of petitioners' constitutional and Title VII challenges to the Consent Decree and the Plan. Neither the district court nor the Court of Appeals reached the merits of petitioners' challenge. Accordingly, the Court should decline to reach these issues. *See Singleton v. Wulff*, 428 U.S. 106, 120 (1976) (general rule is that "federal appellate court does not consider an issue not passed upon below.").

This rule applies with particular force here. The substantive discrimination claims asserted by petitioners impose on them the burden of proving a number of contested factual matters, including, for example, the alleged causal connection between the Affirmative Action Plan or Consent Decree and any harm suffered by petitioners. The most striking characteristic of petitioners' showing below is a complete lack of evidentiary support for their theories. In other words, petitioners come before this Court with bare legal theories, unconnected to any substantial factual foundation and without proof of personal harm to individual parties. Despite this posture, petitioners seek not only reversal of a Court of Appeals holding that they lack standing, but entry of an affirmative ruling in their favor on the merits. Just as they ought not be permitted to use the lower courts as a vehicle for

the vindication of principles in the absence of facts, petitioners cannot turn to this Court as a forum for creating legal precedent divorced from a real case and controversy.

Moreover, a number of other procedural issues must be resolved before the merits may be addressed. The trial court never ruled upon a number of evidentiary objections posed by SFUSD because such a ruling was unnecessary in light of the court's standing ruling. For example, SFUSD objected to the statistical evidence presented by petitioners on the grounds that the data was over a decade old and, in part, related to the racial composition of the national workforce, which, under settled Title VII law, had no relevance to petitioners' summary judgment motion. Respondents also objected to a number of petitioners' factual assertions about their employment situations on the ground of lack of foundation. Moreover, respondents objected to all interrogatory responses that were not properly authenticated or verified.

In addition, respondents argued in their summary judgment motion that each of petitioners' claims was barred by the applicable statutes of limitations. For example, many of their claims related back to the early 1980's, years before this action was filed; three of the petitioners are now employed as permanent teachers with SFUSD. Although the lower courts' rulings made it unnecessary to reach this issue, the untimeliness of petitioners' claims is an insurmountable hurdle standing in the way of their goal. SFUSD also pointed out that only one of the petitioners obtained the requisite right-to-sue letter from the EEOC prior to instituting their Title VII action. For all of

these reasons, certiorari should not be granted with respect to petitioners' challenge on the merits to the Consent Decree and Affirmative Action Plan.

CONCLUSION

The petition for writ of certiorari should be denied.

DATED: November 11, 1993

Respectfully submitted,

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